FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 796 . . 41

CHESTER G. BOLLENBACH,

Petitioner.

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

BERNARD HERSHKOPF,
Attorney for Petitioner.

HENRY G. SINGER and
HARRY SILVER,
With him on the Brief.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 162

INDEX

Table of Cases Cited

Other Authorities Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

CHESTER G. BOLLENBACH,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Chester G. Bollenbach, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this case, January 31, 1945 (1404-6).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and by Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11.

The Circuit Court of Appeals for the Second Circuit reversed the judgment of conviction on December 5, 1944, and ordered a new trial (1297-1316). A petition for rehearing made by the United States Attorney was duly entertained, and on January 12, 1945, the Circuit Court reversed itself and affirmed the judgment of conviction (1348-1350).

Petitioner filed for rehearing, which was duly entertained and denied on January 31, 1945, when the order for mandate was granted. This petition was filed within thirty days from the date of said mandate in accordance with the rules. Proceedings toward the surrender of the petitioner have been stayed until decision by this Court.

Opinions Below

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (L. Hand, A. N. Hand and Chase, Circuit Judges) has not yet been reported and is printed in the record at pages 433 to 439. The opinion on rehearing has not yet been officially reported and is printed in the record at page 450.

Statement of the Matter Involved

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner of conspiring to violate Section 415 of Title 18, U. S. Code.

The indictment contained two counts; the first count charged petitioner and others with transporting stolen bonds in interstate commerce, and the second count charged the defendants therein with conspiring so to do. (11-17). A severance was granted petitioner. He was tried by jury, acquitted upon the substantive count, and found guilty upon the conspiracy count.

The original reversal of the judgment of conviction was upon the ground that the trial court had erroneously charged the jury on the presumption which arises from possession of recently stolen articles (1041-2, 1306-1316). The error was held to be sufficiently serious to warrant reversal (1315-1316). Upon rehearing on application of the United States Attorney, the Circuit Court, in its second opinion reaffirmed the mistake in the charge but reversed its position and affirmed on the ground that it had overlooked a certain exhibit in the record from which it now held the trial court's error to be negligible (1348-50).

The gravamen of the second count of the indictment upon which petitioner was convicted is that he and others conspired to violate Section 415, Title 18, U. S. Code, in that certain stolen bonds should be transported from Minneapolis to New York (11-12). The indictment did not allege a conspiracy to dispose of the bonds after they came to rest in the State of New York.

The Circuit Court has apparently held that petitioner joined the conspiracy after its alleged and only stated object had been completed. In the original opinion, the Circuit Court said:

> "* * * Strictly speaking, that was not any part of the crime for which he [petitioner] had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York" (1309-10).

The foregoing was prompted by recognition that the facts clearly indicated that petitioner did not have anything to do with the stolen bonds until the transportation was completed and that his activities in the matter revolved around the disposition of some of these bonds after they had come to rest in New York State.

Questions Presented

1. Did the Circuit Court err in sustaining the conviction of petitioner—to use its own language—of an offense "strictly speaking, that was not any part of the crime for which he had been indicted". (1309-1310)?

2. Did the Circuit Court err in holding under the statute, as it existed when the alleged offense was committed, that the disposal of stolen bonds, which had come to rest in the State of New York, was a federal crime?

3. Did the Circuit Court err in holding, under the statute as it existed at the time of the commission of the offense, that the bonds were of sufficient jurisdictional value, especially since the bonds had merged into an allowed bankruptcy claim and had no value and were not effective or operative instruments?

4. Did the Circuit Court err in reversing its original position that the error in the Trial Court's charge was so serious as to warrant a new trial?

5. Did the Circuit Court err in holding that petitioner was guilty as an accessory after the fact of a conspiracy and sustaining his conviction on an indictment which charged him as a principal?

6. Was the sentence of two years and $10,000 fine legal?

Reasons for Allowance of the Writ

1. Each of the questions presented herein embody questions of federal law which have not been, but should be settled by this Court.

2. The decision herein sustaining conviction of an alleged accessory after the fact on an indictment charging him as a principal, departs from the accepted and usual course of judicial proceedings and is a violation of defendant's rights under the Fifth Amendment of the United States Constitution, in that he was held to answer for a crime for which he had not been indicted.

3. The decision herein is at variance and in conflict with the decision of the Seventh Circuit in *Gable* v. *United States*, 84 Fed. (2d) 929, holding that disposal of stolen securities not stolen while in the course of transportation in interstate commerce does not constitute a federal offense.

4. The decision herein convicts petitioner of an offense which was not a crime when committed but became criminal by subsequent amendments to applicable statutes. These amendments are therefore *ex post facto* as to petitioner and his conviction violates the Fifth Amendment of the Constitution.

5. The decision herein appears to be in conflict with applicable decisions of this Court.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case numbered and entitled in its docket as "*United States of America, Appellee,* v. *Chester G. Bollenbach, Defendant, Appellant,*" and that the judgment of said

Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, February 26th, 1945.

CHESTER G. BOLLENBACH,
Petitioner.

By BERNARD HERSHKOPF,
Attorney for Petitioner,
15 Broad Street,
New York, N. Y.

HENRY G. SINGER, and
HARRY SILVER,
With him on the Petition.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, February 26th, 1945.

BERNARD HERSHKOPF,
Attorney for Petitioner and a member of the Bar of this Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

CHESTER G. BOLLENBACH,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Statutes Involved

The Federal Statutes involved are Sections 415, 416, 417, 550, 551 and 88 of Title 18, U. S. Code. Pertinent portions of these statutes are quoted in the Appendix.

Statement of Facts

The Indictment

The indictment contained two counts. The first count charged the transportation from Minneapolis to New York of stolen bonds. The jury acquitted petitioner on this count. The second count, upon which petitioner was convicted, charged that he and several others conspired to transport from Minneapolis to New York twenty-five 6%

Gold Notes of the Minnesota & Ontario Paper Co. of a value of $5,000 or more, which bonds had been stolen from the office of the Clerk of the United States District Court, a violation of Title 18, U. S. Code, Sections 88 and 415. The overt acts were all laid in New York after the transportation had ended and the bonds had come to rest in that State.

The Evidence

One of the co-defendants, Burns, stole the bonds involved from the office of the Clerk of the United States District Court at Minneapolis (680, 690-692, 742). Burns arrived in New York with the bonds on January 31, 1937 (940-942, 950). The bonds involved were twenty-five 6% Gold Notes of the Minnesota & Ontario Paper Co. which had been filed together with proofs of claim by the owners of said bonds in a bankruptcy proceeding of the paper company which had been pending in the United States District Court at Minneapolis (26-40). After filing, these proofs of claim were allowed on or before January 21, 1935 (Ex. F, 1201-1203).

After the bonds arrived in New York and Burns had encountered some difficulty in the disposition of ten of them (245, 249, 502-511, 421, 281), he called upon petitioner for aid in disposing of the remaining fifteen bonds (1179). The bonds were disposed of through an attorney named Turley, who had been convicted in an earlier trial of this indictment (758, 609, 620, 621, 636, 637, 729). The proceeds of the sale of these bonds were divided in Turley's office and petitioner received about $900 as his share (1189).

The acquittal of petitioner on the substantive offense, as well as the opinion of the Circuit Court of Appeals (1315-1316), completely removes any doubt on the subject of whether petitioner had anything to do with the stealing of the bonds or their transportation. Petitioner was never in Minneapolis (938, 1152).

It can, therefore, definitely be stated that petitioner's only connection with these bonds arose out of his efforts and assistance in disposing of them after they had come to rest in New York State.

ARGUMENT

I

The Circuit Court erred in sustaining the conviction of petitioner—to use its own language—of an offense "strictly speaking, that was not any part of the crime for which he had been indicted" (1309-1310).

The opinion of the Circuit Court of Appeals reads as follows:

> "Strictly speaking, that was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York. However, to help dispose of them was to become an accessory after the fact, and that was also a crime (§ 551, Title 18, U. S. C.). It was therefore also a crime to join a conspiracy to dispose of them; and for that crime the conspirators joining after the transportation was over might be indicted as principals. Skelly v. United States, 76 Fed. 2d 483 (C. C. A. 10)" (1309-1310).

A

The above is directly contrary to the provision of the Fifth Amendment of the Constitution which provides that no person may be held to answer for any crime except on the "indictment of a Grand Jury." It likewise is directly contrary to the fundamental principle of law that a man may not be charged with the commission of one crime and convicted of another.

As Chief Justice MARSHALL said in *The Hoppett*, 11 U. S. 389, 393-4: "The rule that a man shall not be charged with one crime and convicted of another may sometimes cover real guilt, but its observance is essential to the preservation of innocence."

When the Circuit Court said that petitioner's participation in this crime, which was that of the disposal of the stolen bonds, was not "strictly speaking * * * any part of the crime for which he had been indicted," its decision finally determined the issue in so far as petitioner was concerned. Its opinion is clear that petitioner was convicted for a crime not set forth in the indictment and for which he did not stand trial according to the provisions of the Fifth Amendment of our Constitution.

We submit that such a radical departure from the basic concepts of federal jurisprudence provides an urgent necessity that the writ of certiorari here be granted. To permit the present decision of the Circuit Court of Appeals to stand would be to say, that as long as there is any indictment against a defendant, that defendant can be convicted of any crime, even though it is not the offense set forth in the indictment.

Not only is this finding by the Circuit Court of Appeals directly contrary to the rule of law set down by the Supreme Court but it is directly contrary to its own ruling in *United States* v. *Byers*, 73 Fed. (2d) 419, 421, where it reversed a conviction because defendants who were charged with fraudulent purchase of goods were convicted upon evidence which showed a fraudulent disposition of goods so purchased. The ruling is likewise directly contrary to the holding of the First Circuit in *Malaga* v. *United States*, 57 Fed. (2d) 822, 825.

The illegal agreement is the gist of the crime of conspiracy. (*Pettibone* v. *United States*, 148 U. S. 196, 203; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443.) The

agreement or conspiracy alleged in the indictment does not include the disposal of the stolen bonds. It is, therefore, manifest that under any concept of the law or any interpretation of the indictment, petitioner now stands convicted of a crime with which he was not charged and for which he was not tried. There is not a line or phrase in the entire charge of the District Court to the effect that the petitioner was on trial for a conspiracy to dispose of stolen bonds. This new issue, first evolved by the Circuit Court, was never even submitted to the jury.

B

From a reading of the quoted portion of the Circuit Court's opinion it is not entirely clear whether the Circuit Court was holding that petitioner, having acted as an accessory after the fact, could be convicted under this indictment, or whether the concept of accessory after the fact was used for purposes of analogy in order to fix the petitioner's position in the incidents which formed the basis of the evidence against him. In either respect, the Circuit Court was in error. First, there is no such offense as accessory after the fact to a conspiracy, and a defendant may not be convicted as an accessory after the fact under an indictment which charges him as a principal. (See *infra*, V. p. 22.) Second, under the law as it existed at the time of the alleged offense it was not a crime to conspire to dispose of stolen bonds. (See *infra*, II, p. 14).

Moreover, the fact still remains that neither of the two situations—accessory after the fact, or conspiracy to dispose of the bonds—were presented for determination by the indictment which charged conspiracy to transport stolen bonds and nothing else. A conspiracy is not an omnibus charge, under which you can prove anything and everything and convict for the sins of a lifetime. *United States* v. *Terry*, 7 Fed. (2d) 28 (C. C. A. 9.) The Circuit Court apparently arrived at the unwarranted conclusion that

merely because there was a conspiracy count, proof of any other conspiracy, even though not alleged, was sufficient to sustain a conviction. There was no logical relationship between the first statement that to dispose of the stolen bonds made petitioner an accessory after the fact, and the subsequent conclusion that, therefore, it became a crime "to join a conspiracy to dispose of them" (1309-1310). The steps which led to this final erroneous conclusion completely omitted consideration of the allegations of the indictment which, after all is said, ultimately control.

C

A generally accepted test of an indictment is whether it would support a claim of double jeopardy under the Fifth Amendment to the Constitution. Assuming that the petitioner should now be indicted for conspiring to dispose of the stolen bonds (if that was a crime), it is the rule under *Burton* v. *United States*, 202 U. S. 344, 380, that he could not interpose a plea of double jeopardy because both indictments would not allege the same offense. In *Reynolds* v. *People*, 83 Ill. 479, 481, it was held that an acquittal of one as an accessory "after the fact" was no bar to a prosecution of the same party as a principal in the offense.

D

The overt acts (13-17, 1305, 1310) refer to matters which occurred only after the bonds came to rest in the State of New York and this was recognized by the Circuit Court when it said: "The fact that the overt acts were all laid at a time after the transportation of the notes had ended in New York presupposes that the accused could not be convicted of a conspiracy which he only joined thereafter" (1305).

Overt acts cannot enlarge the scope of the agreement or conspiracy (*United States* v. *Britton*, 108 U. S. 192;

Pierce v. *United States*, 252 U. S. 239). The agreement must be preliminary to the commission of the overt act. One can only be guilty of conspiracy if he joined it prior to the commission of the act in pursuance of which it was formed (15 *Corpus Juris Secundum*, Section 75, p. 1107). Incidentally, the overt acts do not mention the disposition of stolen bonds.

Reliance upon *Skelly* v. *United States*, 76 Fed. (2d) 483 (C. C. A. 10), for a holding that overt acts may be laid after the conspiracy had been completed was error (1310). That case is not authority for that proposition, because the indictment in the *Skelly* case actually alleged a conspiracy to transport a kidnapped person as well as the ransom money across State lines and to change the money into a different form so as to avoid detection and arrest. It is not authority for a holding that a man may be indicted for one crime and convicted of another. A further discussion of the *Skelly* case will be found at page 23, *infra*, V.

The ruling of the Circuit Court on this subject was further error and directly contrary to its own ruling and that of other Circuits, because it is clearly the law that, when the object of a conspiracy is attained, the conspiracy ends and anything which occurs thereafter cannot possibly be any part of the conspiracy (*Lonabugh* v. *United States*, 179 Fed. 476 (C. C. A. 8); *Gable* v. *United States*, 84 Fed. (2d) 929 (C. C. A. 7); *De Luca* v. *United States* (C. C. A. 2) 299 Fed. 741). It is interesting to note that this very question disturbed the trial jury which asked, "Can an act of conspiracy be performed after the crime is committed" (1032). The Trial Court did not answer this question (1306-1307).

Since petitioner was not a party to the scheme prior to the date when the bonds arrived in New York—January 31, 1937—(940-942, 950, 1309), it is error to permit the conviction to stand.

In *Gable* v. *United States* (*supra*), the Seventh Circuit said, in a case almost identical with ours, where one of the alleged conspiracies was to transport stolen bonds: "The only proof is that after the bonds had been stolen and transported and delivered to him he agreed for a commission, to dispose of the same. This is not proof of the conspiracy charged."

The variance in holding in these two Circuits alone warrants the issuance of the writ.

II

Under the statute, as it existed when the alleged offense was committed, the disposal of stolen bonds which had come to rest in the State of New York was not a crime under Federal Law.

Gable v. *United States*, 84 Fed. (2d) 929 (C. C. A. 7), is complete authority for the above. It has never been overruled.

The only statute which dealt with the disposal of stolen bonds was Section 416, Title 18, U. S. C. This statute was amended on August 3, 1939, about eighteen months after the alleged offense was committed (11-17). The Circuit Court has apparently decided this case without realization that the amendment did not and could not affect the petitioner. Under the law, as it originally existed, it was not a crime to dispose of stolen bonds unless the bonds were stolen while moving in interstate commerce (See Appendix, Section 416, Title 18, U. S. C.).

In the *Gable* case (*supra*), the Court said: "Under the act here relied upon, the receiver is not guilty unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the present case the property received by appellant was not

stolen while moving in such commerce. Rather it was stolen in the State of Missouri, thereafter transported to Chicago, and then delivered to appellant. Consequently, there is no proof of guilt under section 416" (p. 930).

In the instant case the Circuit Court said, quite contrary to the above authority, that it was "a crime to join a conspiracy to dispose of them" (1309-1310). This was error, more particularly since the Court had already held that the bonds had come to rest in the State of New York (1309).

Compare Section 416, Title 18, U. S. C., as amended, with the statute in its original form (Appendix). The new statute removes the condition which required that the bonds had to be stolen while moving in interstate commerce.

III

Under the statute, as it existed at the time of the commission of the offense, the bonds were not of sufficient value to bring them within the statute. The bonds having merged into allowed bankruptcy claims, had no value and were not effective or operative instruments.

The statute, as it existed between January 1, 1937 and January 1, 1938 (13-19), made it an offense to transport stolen bonds "of the value of $5,000 or more" (See Appendix, Sections 415, 417, Title 18, U. S. C.). On August 3, 1939, these statutes were amended so that the test of jurisdictional value was "face, par or market value whichever is the greatest" (See Appendix Amendments to the above statutes).

The evidence established that the stolen Gold Notes (which we have described as bonds) were affixed to proofs

of claim in bankruptcy which had been allowed on January 21, 1935 (Ex. F, 1201-1203).

The allowance of a claim in bankruptcy has the same legal effect as a judgment (*United States* v. *American Surety Co. of N. Y.*, 56 Fed. (2d) 734, 736; *Lewith* v. *Irving Trust Company*, 67 Fed. (2d) 855), into which it is elementary, a cause of action merges (*Hamer* v. *New York Railways Company*, 244 U. S. 266). Thus the stolen securities herein had merged in the allowed bankruptcy claim and were no longer operative.

When the common law rule, that the theft of securities did not constitute the crime of larceny, was superseded by statutes bringing the theft of securities within the interdiction of the law, the question of the application of the statutes to inoperative and ineffective paper arose. The Courts early held that to constitute larceny under the statutes the written instrument must be effective and operative when taken. See discussion at *People* v. *Loomis & Ramsdell*, 4 Denio (N. Y.) 380.

In consequence of these early holdings that the theft of securities, which are not effective and operative when taken, does not constitute larceny, statutory amendments became prevalent explicitly extending the larceny statutes to sundry types of inoperative and ineffective securities (see for example, Section 1292 of the Penal Law of New York State).

Indeed, in the instant case, the securities were past due and had no value even in the hands of a holder in due course.

It may well be, that the amendment of Section 417, Title 18, U. S. Code, in 1939 (Section 5, of 53 Stat. 1178), setting up the face value of securities as a criterion for ascertaining their jurisdictional value likewise recognizes the necessity for such explicit enactment in order to extend

the coverage of the law to securities such as those in our case. Such amendment, however, was not in effect when the bonds herein were stolen, transported or disposed of.

The Circuit Court recognized that a full disclosure of the facts would show that these stolen bonds did not have an actual value of $5,000. It said, speaking of these bonds: "They had an actual value of $5,000, as the record shows, even though it was factitious, and would not have survived a full disclosure of the facts" (1303). At this point it is interesting to note that petitioner was concerned only in the disposition of fifteen of the stolen bonds. Although they had no value whatever, they were sold for $4,050 (638) —less than the jurisdictional amount.

The Circuit Court attempted to describe the bonds as "altered securities" (1303). The Court also said that "the statute covers 'falsely made, forged, altered or counterfeit securities'." (1302). Here, again, the Court erred, because it decided this question not on the basis of the statute as it existed when the offense was committed, but on the basis of the statute as it existed after the amendment in August of 1939.

Section 415, Title 18, U. S. C., made no reference to altered or forged securities (see Appendix). The first reference to altered or forged instruments is found in the amendment passed after the offense was committed. Petitioner was, therefore, convicted of an offense which did not exist and which was subsequently created by Act of Congress.

IV

The original finding of the Circuit Court that the error in the charge was so serious as to warrant reversal was correct. The admittedly erroneous charge was tantamount to an instruction to convict. The decision on reargument was error.

A

The Admittedly Erroneous Charge

> "I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case" (1041-2).

Speaking of this charge, the Circuit Court stated:

> "* * * but we think it was wrong to tell the jury that the possession of the notes raised the presumption that the accused was the thief and had transported them in interstate commerce; * * *" (1310).

After discussing *Drew* v. *United States*, 27 Fed. (2d) 715, 716, and withdrawing the dictum therein upon the ground that it was "an inadvertence" (1314), the Court came to the conclusion that the jury "relied upon the presumption and that it was the keystone of the arch" (1315).

As the Circuit Court stated in its original opinion, the only presumption that can be drawn from possession of recently stolen articles is that of "guilty knowledge" (1312). "Certainly it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce" (1313).

In order to view this error in its proper setting, reference to the time when and the manner in which the charge was made, is important. The jury had been deliberating for seven hours (from 3:10 to 10:00 o'clock P. M.) (1024-1026), and reported that they were in "a hopeless deadlock" (1026, 1028).

A juror asked:

> "Can any act of conspiracy be performed after the crime is committed?" (1032).

The Court failed to answer this question directly (1306). The jury went out a second time and returned at 10:30 P. M. (1035). At this time a note was handed to the Trial Judge with the following question:

> "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?" (1041).

It was in response to this question that the above quoted erroneous charge was given and it is essential to observe that the jury left the courtroom at 10:40 and returned in five minutes, at 10:45, with a verdict of guilty on the second count (1043-1044). The jury's question was directed toward the second or conspiracy count and it is entirely fair to assume, as the Circuit Court of Appeals did, in its original opinion, that the verdict was directly attributable to the erroneous charge.

It has been demonstrated under "I" and "II" (*supra*) that no one can join a conspiracy after its purpose has been accomplished. Therefore, the Court's response to the juror's question was wrong on another account. The answer to the questions should have been a definite and positive "No." When the Trial Court said, "Of course if it occurred afterwards it would not make him guilty, * * *" (1041), it was, to borrow the language of the Circuit Court of Appeals, that "the accused would not be guilty of

conspiracy if he only learned that the notes were stolen after he had disposed of them, he would be guilty, if he learned so before" (1308-9).

The latter was only one way of interpreting the words, "occurred afterwards" as used by the Trial Judge (1041). A more reasonable interpretation in view of what the Court said thereafter would be that knowledge of the stolen character of the bonds acquired after they had come to rest in New York but prior to their disposal, would be sufficient to warrant a conviction on the conspiracy count.

Both of these interpretations lead, however, to the same conclusion, *i. e.*, that the jury relied upon the presumption to find the defendant guilty of conspiracy. As we have demonstrated under "I" (*supra*) the only conspiracy alleged was to transport the bonds, and the Trial Court's erroneous charge that from possession, a presumption of theft and transportation follows, was a direction to convict.

Manifestly, neither of these two—theft or transportation—was the basis of the conspiracy charge. The conspiracy depended upon the agreement, and knowledge acquired after the original agreement of conspiracy had arrived at a completed state, could never revive the conspiracy so as to enable petitioner to join it. The plain effect of the erroneous charge was to tell the jury that under the presumption they could find the petitioner guilty of being a party to a conspiracy to bring the stolen bonds from Minneapolis to New York. That this was error is apparent and uncontroverted.

B

The Circuit Court has reversed itself on rehearing because of a statement made by petitioner that he knew that the bonds had come "from the west," and that petitioner's counsel had made a similar concession in the brief on the

appeal (1350). In view of this statement and concession, the Circuit Court decided that the error was negligible and could be disregarded. This was error. The jury had before it the statement of petitioner (Exs. 69, 70, pp. 371, 385 of Record). Just before the erroneous instruction was made, the petitioner's statements were discussed in the presence of the jury (1036-1038).

Whether the petitioner knew that the bonds came from the west did not, in any way, devitalize the error in the Court's charge that he was "the thief and transported stolen property in interstate commerce" (1042). As a matter of fact, the statement contradicted this presumption, as appears at folio 1152. Where petitioner said he had never been in Minneapolis in his life, and that the first time he learned of the bonds being in New York was on February 5, 1937 (1121, Ex. 69). In the second statement (Ex. 70) petitioner said that Burns told him that he had "15,000 Minnesota Ontario Paper Co. bonds and wanted to dispose of them" (1177), and that petitioner first learned that the bonds had been stolen "after the bonds had been sold or during the consummation of the selling of the bonds" (1179); and that Burns had brought them "from the west" (1181).

There was nothing in the statements by petitioner to justify a finding that he had joined a conspiracy to bring the bonds from the west. The acquittal on the substantive count demonstrated the jury's belief that the petitioner was not the thief and had not transported them. This was the opinion of the Circuit Court (1315). It having been established, therefore, that petitioner was not the thief and had not transported the bonds, who can now say that the presumption improperly charged by the Trial Court was not the cause of the verdict on the second count?

There is no doubt that the trial jury was convinced that the appellant did not become connected with these bonds in any way until after they had come to rest in the State of

New York. It was this charge on presumption which cemented the contrary unproven and untrue idea in their minds.

It was the duty of the Trial Judge to tell the jury without qualification or modification that if they believed from the facts in the case that appellant had joined in this transaction after the bonds came to rest in New York, and after the crime of transportation was completed, that appellant could not be convicted of a conspiracy to transport them. After all is said, that is the only charge of which he was convicted.

V

It was error to hold that petitioner was guilty as an accessory after the fact of a conspiracy, and that an accessory after the fact can be convicted on an indictment charging him as a principal. The sentence was illegal.

The foregoing represents the alternative view of the Court's equivocal holding under the quoted portion of its opinion set forth under "I" (pp. 9 and 11). In addition, the Circuit Court said (drawing an analogy between this case and the *Drew* case, *supra*): "That was enough, for the accused, once knowledge was brought home to him that the goods were stolen, was guilty either as the thief, or, as we have shown, as accessory after the fact under Section 551 of Title 18, U. S. Code" (1313).

The crime of being an accessory after the fact is defined by Title 18, U. S. Code, Section 551, which also provides that the punishment for such an offense is one-half the maximum punishment which can be meted out to the principal. Accessories before the fact are classed as principals under Title 18, U. S. Code, Section 550. The general rule of law to which no exceptions have been found is that an accessory after the fact must be indicted as such and

cannot be indicted as a principal (*Wharton's Criminal Law*, Sec. 285; *42 Corpus Juris Secundum*, 1078, Sec. 149; *31 Corpus Juris*, 845, Sec. 458).

It is well settled at common law that receivers of stolen property are not accessories after the fact. (1 *Bishop Criminal Law* 692, 695, 699; *Wharton's Criminal Law*, Volume 1, p. 370—footnote). An accessory after the fact is one who receives, comforts, or assists a felon. This assistance must be to the person and not the loot. The distinction between an aider and abettor under Section 550 of Title 18, U. S. Code, and an accessory after the fact under Section 551, Title 18, is definite and certain.

The Circuit Court continuing on this line further said that it was also "a crime to join a conspiracy to dispose" of the stolen bonds, "and for that crime the conspirator joining after the transportation was over might be indicted as principals. (*Skelly* v. *U. S.*, 76 Fed. (2d) 483, C. C. A. 10)" (1309-10). In this statement, the Court fell into error because there is no relationship between the indictment in this case and the one in the *Skelly* case (*supra*). The language of the two indictments differs as to the purpose to be accomplished by the conspiracy. The indictment in the *Skelly* case charged a comprehensive conspiracy to transport a kidnapped person as well as the ransom money across state lines. It charged, as part of the illegal agreement, the changing of the money into different form so as to "avoid detection, apprehension and arrest." In our case, the only allegation which appears in the indictment of the purpose of the conspiracy is to transport the stolen bonds from Minneapolis to New York and to violate Title 18, U. S. Code, Section 415, which refers to the transportation of stolen bonds.

It is thus apparent that the Circuit Court in its very opinion, recognizes that the defendant did not conspire to transport the stolen bonds (1309). It is true that every

person who joins a conspiracy becomes criminally liable. However, when the purpose of the conspiracy has been accomplished there is no conspiracy to which anyone could attach himself. We have been unable to find a single authority for the proposition advanced by the Circuit Court of Appeals to the effect that there is such an offense as an accessory after the fact to a conspiracy. The discussion of accessories after the fact in the lengthy footnote at 76 Fed. (2d) 488, does not sustain the Circuit Court's contention.

Assuming *arguendo* that the accessory theory could be sustained it would necessarily follow that petitioner could only be punished according to the provisions of the accessory statute (Section 551, Title 18, U. S. C.) which provides for a sentence of one-half of the maximum originally fixed for the offense. Conspiracy under Section 88, Title 18, U. S. C., may be punished by a maximum of two years imprisonment and $10,000 fine. Therefore, the punishment of an accessory after the fact is limited to a punishment of one year's imprisonment and a $5,000 fine. The Court here imposed the two years imprisonment and a $10,000 fine; and if the accessory after the fact theory is correct, the sentence is clearly illegal and must be reduced to not more than one year and $5,000 fine.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

BERNARD HERSHKOPF,
Attorney for Petitioner.

HENRY G. SINGER and
HARRY SILVER,
With him on the Brief.

APPENDIX

Section 88, Title 18, U. S. Code

(Criminal Code, section 37.) Conspiring to commit offense against United States.—if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 415, Title 18, U. S. Code—before amendment

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

Section 415, Title 18, U. S. Code—as amended August 3, 1939

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged,

altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States", as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:261) or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 3, 48 Stat. 794; Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178).

Section 416, Title 18, U. S. Code—before amendment

Same; receipt or disposal of goods, securities or money feloniously taken while a part of interstate commerce.—Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of $5.000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than ten years, or both. (May 22, 1934, c. 33, sec. 4, 48 Stat. 795.)

Section 416, Title 18, U. S. Code—as amended August 3, 1939

Same; receipt or disposal of goods, securities or money feloniously taken; receipts of articles used in counterfeiting. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce knowing the same to have been stolen, unlawfully converted, or taken, or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited, or whoever shall receive in interstate or foreign commerce, or conceal, store, barter, sell, or dispose of, any such bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in Section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:251) or (2) an obligation, bond, certificate, security, Treasury note, bill, promise to

pay, or bank note issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 4, 48 Stat. 795; Aug. 3, 1939, c. 413, sec. 2, 53 Stat. 1178).

Section 417, Title 18, U. S. Code—before amendment

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof (Sections 415, 416 of this title). (May 22, 1934, c. 333, sec. 5, 48 Stat. 795).

Section 417, Title 18, U. S. Code—as amended August 3, 1939

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of section 3 and 4 hereof (Sections 415, 416 of this title), and the value of any securities referred to shall be considered to be the face, par, or market value, whichever is the greatest.

Section 550, Title 18, U. S. Code

(Criminal Code, section 332). "Principals" defined.—Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Section 551, Title 18, U. S. Code

(Criminal Code, Section 333). Punishment of accessories.—Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.